

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of the Television Table of	)	MB Docket No. 04-312
Allotments to Delete Noncommercial	)	RM No. 11049
Reservation on Channel *39, 620-626 MHz,	)	
Phoenix, Arizona, and to Add Noncommercial	)	
Reservation on Channel 11, 198-204 MHz,	)	
Holbrook, Arizona	)	

To: Media Bureau

**JOINT REPLY COMMENTS OF NBC TELEMUNDO LICENSE CO. AND  
COMMUNITY TELEVISION EDUCATORS, INC.**

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**I. INTRODUCTION AND SUMMARY**

This proceeding offers the Commission a unique opportunity to better fulfill its statutory mandate to ensure fair distribution of television allotments by preserving over-the-air service to an otherwise unserved community while delivering competition and real choice to hundreds of thousands of underserved Spanish-language viewers. NBC Telemundo License Co. (“NBC Telemundo”), licensee of Station KPHZ, Channel 11, Holbrook, Arizona, and Community Television Educators, Inc. (“CTE”), licensee of Station KDTP, Channel \*39, Phoenix, Arizona, demonstrated in their Joint Comments that exchanging the reserved designation of Channel \*39 with the non-reserved designation of Channel 11 and modifying the Stations’ licenses accordingly (the “Proposal”) will best serve the Commission’s allotment policies and its commitment to localism, competition and diversity.<sup>1</sup> Grant of the Proposal will permit a Telemundo

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<sup>1</sup> See Joint Comments of NBC Telemundo License Co. and Community Television Educators, Inc., *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel \*39*,  
*Footnote continued on the next page.*

station to offer, for the first time, full-power competition in free, over-the-air Spanish-language television broadcasting in Phoenix, the ninth-largest Hispanic Designated Market Area (“DMA”) and the sixth-largest Hispanic population center in the United States. This competition will directly benefit the exploding Hispanic population in and near Phoenix and the advertisers who seek to reach them by providing choice in Spanish-language news, entertainment, and children’s educational programming and choice for advertisers seeking to buy time on full-power Spanish-language television stations in Phoenix.

The benefits of the proposed exchange – especially increased competition and programming options – have been recognized by prominent government leaders, such as Congressman Raul Grijalva of Arizona’s 7<sup>th</sup> District, Arizona Governor Janet Napolitano, and Phoenix Mayor Phil Gordon, as well as numerous civic, public safety, cultural, and charitable organizations, including many associated with the Hispanic community. These individuals and organizations have gone on record in support of the Proposal and are urging the Commission to grant it. For example, Congressman Grijalva – who has been named second vice-chair of the Congressional Hispanic Caucus for the upcoming 109<sup>th</sup> Congress – accurately summarized the benefits of the Proposal in a letter he filed with the Commission supporting grant of the Joint Petition:

[T]he Spanish speaking community of the greater Phoenix area has only one option for Spanish language television. The NBC Telemundo commitment to offering this

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*620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona* (filed Nov. 30, 2004) (“Joint Comments”) filed in response to the Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel \*39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, 19 FCC Rcd 14930 (MB 2004) (“NPRM”).

community another free viewing option is an extremely attractive proposition. As I am sure the Commission will agree, creating competition for the Spanish language viewer is an important public policy objective. When stations are forced to compete, they offer better viewing options and better service. Moreover, NBC Telemundo is committed to offering an attractive package of Spanish language news. This is of vital importance to the Hispanic community.<sup>2</sup>

Other organizations who support grant of the Proposal and whose statements of support are submitted herewith include:

- Arizona League of United Latin American Citizens (“LULAC”)<sup>3</sup>
- Arizona State Senator Pete Rios
- Arizona State Representative Ben Miranda
- Arizona State Representative John Loredó
- Arizona Department of Health Services
- Phoenix Mayor Phil Gordon
- Phoenix City Councilmember Michael Johnson
- Chandler Mayor Boyd Dunn
- Tempe Mayor Hugh Hallman
- Maricopa County Sheriff’s Office
- Maricopa County Supervisor Mary Wilcox
- Phoenix Police Department
- Phoenix Fire Department
- Glendale Police Department
- Tempe Police Department
- Cesar E. Chavez Foundation
- Arizona Latino Media Association
- Valle del Sol
- Comité Guatemalteco Arizona
- Migrant Health Education
- Desert Southwest Annual Conference, The United Methodist Church

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<sup>2</sup> See Letter from Raul M. Grijalva, U.S. House of Representatives, Arizona, to The Honorable Michael K. Powell, Chairman, Federal Communications Commission, at 1 (Nov. 30, 2004) (attached hereto in Exhibit 1). The 7<sup>th</sup> Congressional District is the second-largest district in the State of Arizona, covering 22,872 square miles, including portions of Tucson and Maricopa County’s West Valley.

<sup>3</sup> With approximately 115,000 members, LULAC is the largest and oldest Hispanic organization in the United States. LULAC’s mission is to advance the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans through community-based programs operating at more than 600 LULAC councils nationwide.

- Roman Catholic Diocese of Phoenix
- St. John Vianney Catholic Church
- De Colores Domestic Violence Shelter/CPLC
- University of Arizona, Hispanic Center of Excellence, School of Medicine
- Omega Delta Phi (Arizona State University)
- Molina/Lopez
- Race for the Cure, Phoenix Affiliate
- Make a Wish Foundation of Arizona
- Arizona Diamondbacks
- Phoenix Suns
- Arizona Heatwave<sup>4</sup>

All of these supporters recognize the substantial benefits that the Proposal will bring to their communities and their constituents.

Against this overwhelming public support are only two voices in opposition – Univision Communications, Inc. (“Univision”) and Council Tree Communications, Inc. (“Council Tree”) – current or potential competitors whose comments must be read with their self-interest in mind and must also be weighed against this backdrop of solid support from government leaders and diverse community organizations.<sup>5</sup> Univision and Council

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<sup>4</sup> The statements in support received to date from these individuals and organizations are reproduced in Exhibit 1. The Proposal is also supported by nearly 30 religious and/or noncommercial broadcasters who jointly filed comments in this proceeding on November 30, 2004, urging the Commission to grant the Proposal.

<sup>5</sup> See Univision Communications, Inc. Comments, MM Docket 04-312 (Nov. 30, 2004) (“Univision Comments”); Council Tree Communications, Inc. Comments, MM Docket 04-312 (Nov. 30, 2004) (“Council Tree Comments”). Univision is the ultimate owner of the only free, over-the-air, full-power Spanish-language television station – Station KTVW-TV (Channel 33) – currently broadcasting in Phoenix.

Council Tree is a former investor in Telemundo that has invested in other Spanish-language broadcast outlets. NBC Telemundo understands that, as an investor in Telemundo, Council Tree proposed a similar transaction with CTE. It should be noted that although Council Tree attached a certificate of service to its Comments, the Comments were not in fact served on the counsel named in the certificate. Further, neither the Comments as obtained from ECFS nor the certificate of service attached to the Comments contained the signature (typed or otherwise) or the name and address of the person responsible for the content of the Comments as required by the FCC’s rules. See 47 C.F.R. §§ 1.47(g), 1.52 (2003). Accordingly, Council Tree should not be accorded party status in this proceeding. As a courtesy, the parties are serving these Reply Comments on Council Tree at the address shown on the ECFS docket entry for Council Tree’s Comments.

*Footnote continued on the next page.*

Tree cannot ignore or hide from three indisputable and decisionally significant facts: of the many sources of Spanish-language programming identified by Univision (1) only *one* – the station owned by Univision – offers a free, over-the-air, full-power television service; (2) only *one* – the station owned by Univision – is entitled to mandatory carriage on Phoenix-area cable systems; and (3) only *one* – the station owned by Univision – is carried on the basic tier of Cox’s Phoenix cable system. Accordingly, the public interest calculus is clear: grant of the Proposal will dramatically improve the choices in Spanish-language television in Phoenix, while denial of the proposal will perpetuate one voice, one vision – literally, Univision – in full-power Spanish-language television service in Phoenix.

The opening comments filed in this proceeding by Univision are replete with glaring inconsistencies, fallacies, and falsehoods that demonstrate the willingness of Univision to put forth whatever arguments it thinks might kill the only realistic prospect of introducing a full-power Spanish-language station in Phoenix to compete with its Station KTVW-TV in the near future. Examples of just three of these inconsistencies reveal the self-serving nature of Univision’s opposition:

- That Station KPHZ’s same-channel digital facility, if constructed, will bring service to millions of people living in Phoenix, *but* that Section 1.420(h) nevertheless does not apply to the Proposal.
- That NBC Telemundo’s Class A Station KDRX in Phoenix is destined to lose cable carriage in CTE’s hands *but* that NBC Telemundo should nevertheless count on cable carriage of KDRX to serve the Hispanic

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CoxCom, Inc. (“Cox”), the largest cable operator in the Phoenix area, also filed comments. Cox expressly took no position in its comments on the legal and policy issues raised by the Joint Petition and addressed its comments to the carriage of Spanish-language programming on its Phoenix system and the effect of the proposed exchange on the mandatory carriage rights of the two stations at issue. *See* Comments of CoxCom, Inc., MM Docket 04-312 (filed Oct. 15, 2004) (“Cox Comments”).

residents of Phoenix.

- That the Spanish-speaking viewers in Phoenix (and elsewhere) are not deserving of special efforts to broadcast to them in their own language when Univision relies on precisely that justification to preserve its permanent waiver of the network representation rule.

Univision's numerous fallacies and falsehoods also reveal its willingness to advance any argument to preserve its market position in Phoenix.<sup>6</sup> Among the more egregious of Univision's misstatements are:

- That grant of the proposal will result in a reduction of service to millions of viewers in Phoenix and Holbrook. **False.** There will be *no* reduction in service. Both stations will continue to operate and to serve their respective audiences. Indeed, grant of the proposal offers the best hope for **avoiding** the loss of service in Holbrook.
- That a Class A television station, regardless of its over-the-air reach, can compete effectively with a full-power station. **False.** As Univision concedes, NBC Telemundo's Class A station is not entitled to mandatory carriage on cable systems' basic (and least expensive) tier. Further, the large percentage of Spanish-dominant viewers who rely on indoor antennas cannot receive the Class A station's signal. Finally, as NBC Telemundo has demonstrated with its submission of dozens of statements from advertisers, Class A stations cannot attract the level of advertising needed to support the development of quality local news and other local programming.
- That pay cable and satellite Spanish-language services are an adequate substitute for free, local, over-the-air television service. **False.** The Commission has already firmly rejected this argument in refusing to consider cable and satellite networks as the equivalent of free local programming in many contexts, including its multiple and cross-ownership rules.
- That NBC Telemundo has numerous alternatives to the Proposal for improving service to the Hispanic population of Phoenix, including a right to purchase Paxson's Phoenix station. **False.** NBC Telemundo has

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<sup>6</sup> Univision owns two full-power television stations in the Phoenix DMA, KTVW, noted above, which is licensed to Phoenix, and KFPH licensed to Flagstaff. Univision also owns five radio station in the Phoenix market and several low power/Class A stations in the Phoenix DMA, including stations licensed to Phoenix.

thoroughly explored all options, and none exists. Although Univision recognizes that NBC Telemundo has a “right of first refusal” with respect to the Paxson station, it apparently has forgotten what that phrase means – NBC Telemundo’s rights arise *only* if a third party makes a bona fide purchase offer – a circumstance that has never existed. In the meantime, Phoenix’s huge Spanish-language community has but a single full-power, over-the-air Spanish-language television option.

- That the Commission’s allotment priorities will be harmed by assigning the noncommercial reservation to Channel 11 in Holbrook and removing that designation from Channel \*39 in Phoenix. ***False.*** As the parties demonstrated in the Joint Comments, because it had lain fallow for so long, Channel \*39 was destined for deletion if an application had not been filed just prior to the deadline. Moreover, even with respect to the ten largest cities in the U.S. (including Phoenix), the Commission has disregarded the 1952 allotment policy of endeavoring to allot two reserved channels to the largest cities as often as it has followed it. For Univision to suggest, under these circumstances, that the Channel \*39 allotment is now sacrosanct is contrary to the facts and the Commission’s actions.

The other arguments advanced in Univision’s comments and those filed by Council Tree are equally lacking in merit and do not diminish the compelling public interest benefits of the Proposal. Inconsistent arguments and apparent disregard for facts may be sufficient grounds on which to justify an opposition for self-interested parties; however, they cannot justify Commission rejection of a proposal that overwhelmingly advances competition, diversity and the statutory mandate for fair distribution of television allotments, as well as delivers immediate and direct benefits to members of the public who seek access to a real choice in Spanish-language television broadcast programming in Phoenix.

**II. THE GLARING AND SELF-SERVING INCONSISTENCIES IN UNIVISION’S COMMENTS DEMONSTRATE ITS WILLINGNESS TO ADVANCE ANY ARGUMENT TO PRESERVE ITS MARKET POSITION IN PHOENIX AND DEPRIVE THE HISPANIC AUDIENCE OF A REAL COMPETITOR TO KTVW-TV**

**A. Univision Cannot Point To The Predicted Coverage Of Phoenix From Channel 11’s Future And Hypothetical Same-Channel Digital Facility While Also Claiming That Section 1.420(h) Of The FCC’s Rules Does Not Apply To This Proceeding**

One of the most blatant of Univision’s inconsistencies goes to the very heart of this proceeding – whether the Proposal should be granted under the procedures established in Section 1.420(h) of the Rules. On the one hand, Univision argues that Holbrook is located much too far from Phoenix<sup>7</sup> to qualify for a channel exchange under Section 1.420(h) of the Commission’s Rules.<sup>8</sup> On the other hand, Univision contends that KPHZ’s unbuilt same-channel digital facility will “vastly” expand the coverage of the station, including service to Phoenix and the Hispanic residents of Phoenix.<sup>9</sup> Putting aside for a moment the logistical and other difficulties associated with a flashcut from analog to digital on Channel 11 as a way of serving Hispanics living in Phoenix (particularly given the large percentage of Spanish-dominant viewers who rely on over-the-air reception), Univision – and the Commission – cannot have it both ways. If KPHZ’s digital construction permit is relevant to the Commission’s consideration of this

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<sup>7</sup> As support for a distance between Phoenix and Holbrook of more than 234 miles, Univision cites Mapquest.com. Univision Comments at 1 n.3. As the Commission – and, presumably, Univision – know, however, radio waves do not need to travel by road. The direct distance – i.e., as television broadcasts fly – between the two communities is reported to be 145 miles. See <http://www.indo.com> (visited on Dec. 13, 2004).

<sup>8</sup> Council Tree also contends that Section 1.420(h) should not apply to the channel exchange.

<sup>9</sup> Univision Comments at 18-19.

matter, then the Commission should have proceeded on that basis and granted the parties' Joint Petition to Amend the Television Table of Allotments ("Joint Petition") under Section 1.420(h). If the digital permit does not "count" for such purposes, however, the purported coverage of the digital facility cannot be cited as a basis for denying the Joint Petition. Furthermore, in pointing to the digital permit as KPHZ's path to serving Phoenix's underserved Hispanic audience, Univision ignores the pertinent facts about the audience intended to benefit from a competitive, over-the-air Spanish-language service, the state of digital television today, and the digital construction permit itself. To demand that hundreds of thousands of Spanish-dominant viewers in Phoenix wait until the uncertain date that each of them can afford to make the transition to digital technology is just another way for Univision to delay real choice for this community.

**1. The Target Audience Will Not Benefit From A Flashcut To Digital Operation On Channel 11**

Univision claims that constructing Telemundo's authorized Holbrook DTV facilities would increase that station's over-air-coverage from its current 7,147 people to 2,747,108 people, almost all of whom are Phoenix-area residents.<sup>10</sup> As Univision knows full well, however, Station KPHZ did not exist as an operating station when the FCC adopted the Digital Table of Allotments. Accordingly, Channel 11 was not assigned a paired digital channel. Therefore, construction of a digital facility on Channel 11 prior to the end of the digital transition and the possible opening up of new channels will require a flashcut from analog to digital service on Channel 11.<sup>11</sup> Far from improving the

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<sup>10</sup> *Id.* at 18.

<sup>11</sup> *See* FCC File No. BLCT-20010122AOC.

service provided by Station KPHZ, such a flashcut would deprive even *more* viewers of the station's signal. Very few television viewers currently receive digital signals through over-the-air reception by digital tuners, even in major metropolitan areas. And there certainly are no hints of early adoption of digital television sets with built-in tuners among NBC Telemundo's target audience in Phoenix. Instead, the digital signals that are available are typically delivered via cable or satellite. Therefore, even assuming that construction of KPHZ's digital facility will place a strong signal over Phoenix and its large Hispanic population, this intended audience is unlikely to benefit from such a service for the reasons detailed in the Joint Comments, including low cable and satellite penetration rates among Spanish-dominant viewers in Phoenix.

That the new digital signal would ensure cable carriage also mischaracterizes the facts. First, fewer than one-third of Phoenix's Spanish-dominant households subscribe to cable and only 11 percent subscribe to satellite-delivered video services.<sup>12</sup> Second, even if the intended audience could gain access to the digital signal through cable carriage, such carriage of KPHZ-DT is far from guaranteed. Cox has filed comments in this proceeding noting that KPHZ has *never* been carried on its system in Phoenix and making clear that if the station were to assert its must-carry rights as a station assigned to the Phoenix DMA, Cox would respond by requesting the Commission to modify its must-carry market to exclude Holbrook.<sup>13</sup> Based on these undisputed circumstances, Univision's suggestion that KPHZ could serve the Hispanic residents of Phoenix with a

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<sup>12</sup> Joint Comments at 3, n.8.

<sup>13</sup> See Cox Comments at 4-7. Cox took precisely this step to successfully exclude Univision's Flagstaff station from the Phoenix DMA served by Cox's Phoenix cable system. See *CoxCom, Inc.*, 17 FCC Rcd 17192 (MB 2002).

free, over-the-air digital signal is hollow, cynical and dismissive of the needs and interests of this audience. NBC Telemundo is concerned about these viewers in the here and now, not at some undefined and unlikely future point when they may be capable of receiving a free, over-the-air digital signal from Holbrook.<sup>14</sup>

**2. Even If KPHZ-DT Offered A Realistic Alternative For Serving Hispanic Viewers In Phoenix, Univision Has Dramatically Overstated The Unbuilt Station's Coverage Potential**

Univision's claim that KPHZ-DT will serve 2,747,108 people, almost all of whom are Phoenix-area residents, is based on *predicted* coverage from the transmitter site specified in KPHZ's current construction permit. Due to the mountainous terrain between Holbrook and Phoenix, however, this claim dramatically overstates the station's actual coverage. Based on a Longley-Rice study conducted by Telemundo's engineering staff, it is clear that only scattered small pockets of population in the area to the southeast of Phoenix will receive a 36 dBu signal from the digital facility and even fewer will receive a 43 dBu (city grade) signal.<sup>15</sup> The signal will not reach Phoenix proper at all. Accordingly, the facility as currently specified in the construction permit cannot be counted on to provide an acceptable over-the-air signal to Phoenix.

Moreover, NBC Telemundo has serious reservations about the feasibility of constructing the digital facility specified in the outstanding construction permit. As the

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<sup>14</sup> For all of the same reasons, Univision's suggestion that Phoenix's Hispanic viewers should obtain diversity and competition in Spanish-language programming by watching Telemundo on a non-existent digital multicast programming stream offered by an NBC affiliate – a station that NBC does not own – in the market is equally callous and self-serving, as it would delay for years any real Spanish-language competition in Phoenix. See Univision Comments at 20.

<sup>15</sup> See Declaration of Douglas Lung ("Lung Decl.") attached hereto as Exhibit 2 and Attachment A thereto ("Maps Depicting KPHZ-DT Channel 11 Coverage As Filed").

Commission is fully aware, the construction permit was applied for and obtained by Venture Technologies, LLC, NBC Telemundo's predecessor in interest as licensee of Station KPHZ, many months before NBC Telemundo acquired the station. NBC Telemundo had absolutely no role in applying for the digital facility. Since acquiring the station in September 2002, however, NBC Telemundo staff engineers have studied the permit and have become concerned about whether the digital station can be constructed at the specified site due to pre-existing uses that may be incompatible with the construction of broadcast towers.<sup>16</sup> Indeed, it is for this very reason that NBC Telemundo certified in its Form 381 filed on November 5, 2004 for Station KPHZ that the expected coverage of the digital facility would be limited to the current analog service area.<sup>17</sup> In view of these coverage concerns, NBC Telemundo's engineers have considered a number of possible alternative sites for the digital facility, but none of those sites will move the station's service contours closer to the city of Phoenix while maintaining the necessary level of service to Holbrook.<sup>18</sup>

**B. Univision Cannot Claim That Cable Carriage Of KDRX-CA Renders That Station The Equivalent Of Univision's Full-Power Station KTVW-TV While Also Claiming That The Same Station When Operated By CTE Is Unlikely To Be Carried By Cable Systems In Phoenix And Is Therefore Doomed To Fail**

Univision concedes that Class A stations are not entitled to mandatory carriage on cable television systems, but claims nonetheless that NBC Telemundo – and Phoenix's large Hispanic population – should be satisfied with NBC Telemundo's Station KDRX-

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<sup>16</sup> See Lung Decl. at 1.

<sup>17</sup> FCC File No. BCERCT-20041105ACO.

<sup>18</sup> See Lung Decl., Attachment B ("Map Depicting Alternative Sites for KPHZ-DT").

CA because this secondary facility is *currently* carried by cable and other broadband video systems in the market by mutual agreement.<sup>19</sup> Yet Univision also claims – in a breathtaking example of inconsistency – that in CTE’s hands, the station is destined to lose cable carriage and ultimately will fail.<sup>20</sup> Univision hints that this inevitable result is due to Telemundo’s superior programming, but in another example of self-serving inconsistency, Univision claims that withdrawing CTE’s programming from Channel 39 and placing it on KPHZ in Holbrook and KDRX in Phoenix would be a terrible blow to the public interest because three million viewers would be deprived “of a noncommercial service for which they have waited 35 years.”<sup>21</sup> On the other hand, Univision also claims that broadcasting CTE’s programming, rather than Telemundo’s programming, from Holbrook constitutes an “abandonment” of the residents of Holbrook.<sup>22</sup> Univision cannot have it both ways and must concede that a Class A station is simply not the equivalent of a full-power local station regardless of the programming broadcast by the station. Clearly, the Commission cannot base a decision in this proceeding on the assumption that a Class A station in NBC Telemundo’s hands will always achieve cable carriage while the same station in CTE’s hands will not. Moreover, although Univision makes much of the fact that KDRX-CA is currently carried on cable systems in the Phoenix market, it fails to acknowledge the most salient fact about that carriage – Cox, by far the largest cable operator in the market, carries the station on an expanded basic tier that costs

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<sup>19</sup> See Univision Comments at 18.

<sup>20</sup> *Id.* at 14 n.44.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.* at 18.

potential viewers *more than twice as much* as the basic tier.<sup>23</sup>

Finally, even if NBC Telemundo's Class A station in Phoenix had guaranteed cable carriage rights, which it clearly does not, and even if the station were carried on Cox's more affordable basic tier, which it is not, the Joint Comments demonstrated that a majority of the Spanish-speaking audience intended to be served by NBC Telemundo does not subscribe to cable or satellite. Therefore, consigning these viewers to obtaining a competitive Spanish-language alternative to Univision through paid subscription services is, once again, hollow, cynical, and dismissive of the needs and interests of this audience and of the Commission's commitment to increasing competition and diversity. As shown conclusively in the Joint Comments, the Commission has repeatedly rejected the notion that pay services can be the equivalent of free, over-the-air, local television service.

**C. Univision Cannot Claim That Spanish-Speaking Viewers In Phoenix Are Not Deserving Of Special Efforts To Broadcast To Them In Their Own Language When Univision Relies On Precisely That Justification To Preserve Its Permanent Waiver Of The Network Representation Rule**

Univision claims that grant of the Proposal requires the Commission to find a separate Spanish-language broadcasting sub-market, a concept already rejected by the Commission in Univision's merger with Hispanic Broadcasting Corp.<sup>24</sup> This claim is completely false and is flatly inconsistent with Univision's own arguments to the Commission in seeking to preserve its permanent waiver of the network representation

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<sup>23</sup> Joint Comments at 43. Cox serves more than a million subscribers in Phoenix and the surrounding area, while the two other multichannel video programming distributors cited by Univision combined serve roughly one-tenth that number of subscribers.

<sup>24</sup> Univision Comments at 21-24.

rule. That waiver was obtained by Univision under the same public interest standard that applies to the Proposal, which emphatically does *not* require a finding that a separate Spanish sub-market exists. Rather, it rests on the well-established principle that America's largest and fastest growing minority – those of Hispanic descent – deserves access to media and communications services in their own language that are the equivalent in quality and diversity to English-language services – a principle that Univision itself embraced in fighting successfully to retain its permanent waiver of the network representation rule. Indeed, Univision is the direct, financial beneficiary of this principle because it succeeded in retaining a permanent waiver of the network representation rule under which it sells advertising time for its affiliated stations.

As recently as September 2003, Univision stated that the waiver of the network representation rule was absolutely essential to preserve “the Spanish-formatted television service” offered by its affiliates and that absence of the waiver could force Entravision, the largest owner of Univision-affiliated stations, “to cut back on its local programming initiatives” and possibly to withdraw Spanish-formatted television service “because of the difficulty in attracting adequate advertising revenue to support it.”<sup>25</sup>

Thus, when Univision stood to benefit directly (and financially) from the argument that the Commission must foster and preserve foreign-language programming, Univision was more than willing to embrace the argument. When the same principles are cited by its competitor Telemundo to demonstrate the overwhelming public interest benefits of the Proposal, however, Univision is quick to disavow these principles. Once

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<sup>25</sup> Letter from Scott R. Flick, Counsel, Univision Communications Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, at 3, 5 & 6 (Sept. 8, 2003) (“Flick Letter”).

again, Univision cannot have it both ways. The reality is that, while the Commission has not accepted the concept of a separate Spanish-language broadcasting market for purposes of a competitive market analysis, it has fully embraced and frequently acted upon the principle that America's Spanish speakers need and deserve a diversity of information sources on their public airwaves. In several of these proceedings, the FCC has specifically found that Spanish is distinct from all other foreign languages because it is spoken by more residents of the U.S. than any other foreign language and because the number of Spanish-speaking persons is significantly larger than any other non-English speaking population and is growing rapidly.<sup>26</sup> These findings have only gained in importance as Hispanics have become the largest minority in the United States.<sup>27</sup> The

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<sup>26</sup> As explained in detail in the Joint Comments, the Commission has recognized the critical importance of serving the Spanish-speaking community in a number of its actions, for example, in ruling on allotment proposals such as the *San Francisco/San Mateo* case, considering the merits of time brokerage agreements, granting waivers of the network representation and spacing rules, mandating closed-captioning for Spanish language programming, and requiring interstate common carriers to provide interstate Spanish telecommunications relay services ("TRS") for the hearing-impaired. In the case of the network representation, closed captioning, and TRS rules, Spanish was singled out from all other non-English languages for special treatment. See Joint Comments at 29-35.

<sup>27</sup> Univision also trots out the argument that Spanish-language programming is simply a format choice that could be abandoned by NBC Telemundo after the channel exchange in favor of NBC programming. Univision Comments at 22 n.54. This argument is wrong on a number of counts. First, it is once again dismissive of Spanish-speakers to suggest that choosing to program in their native language is the same as simply choosing an entertainment format. Furthermore, NBC and its parent, GE, have made a substantial and long-term commitment to broadcasting directed to the Hispanic audience. In addition to spending \$2.7 billion to acquire the Telemundo network and the Telemundo owned and operated stations, GE subsequently has invested more than \$75 million in acquiring additional stations to improve Telemundo's distribution, including in markets that are smaller and less strategically important for an Hispanic national network than Phoenix. Also, GE has invested additional millions of dollars to enable Telemundo to develop Spanish-language programming in the United States (as opposed to the foreign sources of much Spanish-language programming aired in the U.S.), which responds directly and uniquely to the large and growing Hispanic community in the U.S. Beyond such clear evidence of NBC Telemundo's commitment to the Spanish-language community generally, NBC Telemundo specifically has committed to operate Channel 39 as a Telemundo affiliate and offer one hour of local Spanish-language news programming each weekday if the exchange is granted. The Commission has frequently relied on such programming commitments to justify waivers of its rules. See Joint Petition at 34-36. Finally, as Univision noted in its comments, NBC already has an affiliated station in Phoenix. To suggest that NBC Telemundo is investing the substantial time, money, and resources required to complete this proceeding for the ultimate purpose of acquiring a duplicative outlet for NBC programming in Phoenix is preposterous.

City of Phoenix alone has 449,972 Hispanic residents.<sup>28</sup> The Hispanic viewers in Phoenix need and deserve the competition and diversity in their news, information, and entertainment programming that grant of the Proposal will deliver.

**D. Univision Cannot Seriously Oppose The Proposal On The Ground That It “Protects A Competitor Rather Than The Public” When It Is Denial Of The Proposal That Will Protect A Competitor – Univision**

One final example of Univision’s brazen inconsistency deserves mention. In several sections of its Comments, Univision opposes the Proposal by arguing that “the Commission’s statutory mandate is to protect the public, not promote individual competitors,” and if the Commission grants the proposal, it will be “protecting a competitor rather than the public.”<sup>29</sup> These are hollow words indeed. Given Univision’s entrenched position in the market,<sup>30</sup> it is clear that *denial* of the Proposal will most certainly protect a “competitor” – Univision – at the expense of the public, particularly the Hispanic residents of Phoenix. If Univision believes so strongly in the value of competition and in its own programming, it should be willing to go head-to-head with another full-power competitor instead of trying to erect meritless roadblocks to that competitor’s efforts to provide diversity and choice in free, over-the-air programming.

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<sup>28</sup> 2000 Census. (See <http://www.census.gov>) (“2000 Census”).

<sup>29</sup> Univision Comments at 2, 18.

<sup>30</sup> Univision currently claims 84 percent of the Spanish-language television advertising revenues and 93 percent of the Hispanic viewers in the market, despite the presence of multiple Class A and low-power stations in the market that air Spanish-language programming.

### **III. UNIVISION’S COMMENTS ARE REPLETE WITH FALLACIES AND FALSEHOODS THAT REVEAL ITS WILLINGNESS TO ADVANCE ANY ARGUMENT TO PRESERVE ITS MARKET POSITION IN PHOENIX**

Univision’s Comments are replete with fallacies and falsehoods that, like the inconsistencies described above, underscore Univision’s willingness to advance any argument, no matter how unsupported, to defeat the Proposal and preserve its market position in Phoenix. On the very first page of its pleading, Univision falsely states that the residents of Phoenix “would lose half their noncommercial broadcast programming to the swap.” This untrue claim is repeated on page 3 of the pleading, where Univision states that “[t]he net result of the proposed swap would be a reduction in service to literally millions of viewers both in Phoenix and Holbrook.”<sup>31</sup> As the Commission is fully aware, the Proposal will not result in a net reduction of service in *either* market – both stations will continue to operate and both will continue to serve their respective audiences. In addition, KDRX will air CTE’s programming in Phoenix, and Phoenix will continue to be served by a PBS affiliate on Channel \*8 and Trinity Broadcasting’s noncommercial programming on Channel 21. Further, there will be no net reduction in the number of stations (reserved or commercial) in the DMA. Indeed, for all the reasons described in the Joint Comments, the Proposal offers the best hope for preserving a television outlet in Holbrook, thus avoiding the net reduction that Univision incorrectly claims will result from the grant of the Proposal. Other examples of Univision’s factual misstatements abound in its Comments.

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<sup>31</sup> Univision Comments at i (Summary) and 3.

**A. Univision Incorrectly Claims That KDRX-CA Is The Equivalent Of KTVW-TV For Over-The-Air Service To Hispanic Viewers**

Univision claims that because the predicted coverage of KDRX is “almost exactly” the same as the coverage provided by its KTVW-TV, the stations are functional equivalents for serving the Hispanic audience in Phoenix.<sup>32</sup> Even disregarding (as Univision has so clearly done) the nearly 100,000 residents *not* served by KDRX’s predicted Grade B contour but served by both KTVW and KDTP, Univision’s characterization of functional equivalence does not match the reality. Because Spanish-dominant viewers are much more likely than the bilingual population to rely on reception of television signals through indoor antennas, the technical limitations of low power stations have the greatest impact on this population. The recent survey of Hispanic viewers in Phoenix commissioned by NBC Telemundo reveals that of the respondents who rely on over-the-air signals, 78.6 percent watch only Spanish-language and more than half do not watch Telemundo’s Class A station in Phoenix because the signal is too weak.<sup>33</sup> As to Univision’s claims that Univision’s market position is based on the popularity of its programming, more than three-quarters (76 percent) of these respondents would watch Telemundo more often if its signal were better.<sup>34</sup> Clearly, these

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<sup>32</sup> Although Univision cavalierly claims that KDRX has “almost exactly the reach” of Univision’s Station KTVW, the latter station encompasses almost 100,000 more people in its Grade B contour, hardly an insignificant number. *Id.* at Exhibit 1, Figure 5. Moreover, the gap in Grade B coverage between KDRX on the one hand and KTVW and KDTP on the other includes communities to the southeast of Phoenix with growing Hispanic populations. *See* Lung Decl., Attachment C (“Map Depicting Predicted Grade B Contours of KDRX-CA, KTVW-TV and KDTP”).

<sup>33</sup> *See* Joint Comments, Exhibit 1.

<sup>34</sup> *Id.*

overwhelming percentages of viewers do not agree with Univision that KDRX's signal is equivalent to KTVW's.<sup>35</sup>

The inadequacy of the Class A station's signal and coverage for serving the Hispanic audience in Phoenix is also confirmed by dozens of advertisers who have submitted statements to NBC Telemundo explaining that they do not buy advertising time on the Class A station because of the station's reduced signal strength and limited reach in the DMA and the lack of guaranteed carriage on the basic tier of the cable systems serving the DMA.<sup>36</sup> As Univision itself acknowledged when urging the Commission to allow it to retain its permanent waiver of the network representation rule, attracting adequate advertising revenue is crucial to the implementation of local programming initiatives in Spanish-formatted television services.<sup>37</sup>

Univision concedes that KDRX-CA is not entitled to mandatory carriage on Phoenix-area cable systems, but nevertheless claims inexplicably that the station can reach its intended audience through cable carriage.<sup>38</sup> As noted above, however, although KDRX is currently carried on the Cox cable system serving Phoenix, that carriage arrangement is pursuant to retransmission consent on the expanded basic tier, which

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<sup>35</sup> More than 97 percent of the respondents in the telephone survey commissioned by NBC Telemundo stated that having local Spanish-language television was important to them, and more than 94 percent of respondents agreed that it is important to have more than one local Spanish-language channel available to increase diversity and options for Spanish-language viewers. *Id.* at 38-39.

<sup>36</sup> *Id.* at 36.

<sup>37</sup> Flick Letter at 6.

<sup>38</sup> *See* Univision Comments at 18.

costs subscribers more than twice as much as the basic tier.<sup>39</sup> Further, as demonstrated in the Joint Comments, NBC Telemundo's target audience subscribes to cable and other pay services in disproportionately low numbers. Accordingly, cable carriage of KDRX-CA is not a realistic or appropriate way to introduce a meaningful competitor to Univision into the Phoenix market.

**B. Univision Incorrectly Claims That The Spanish-Speaking Population Of Phoenix Is Well-Served By A Variety Of Programming Sources**

Citing its own full-power station and three low power stations licensed to Phoenix, as well as a number of Spanish-language pay programming services, Univision incorrectly claims that the Spanish-speaking population of Phoenix is well-served by a variety of programming sources.<sup>40</sup> But Univision cannot ignore or hide from three indisputable and decisionally significant facts – of the many sources of Spanish-language programming identified by Univision, only *one* – the station owned by Univision – offers a free, over-the-air, full-power television service. Only *one* – the station owned by Univision – is entitled to mandatory carriage on Phoenix-area cable systems. And only *one* – the station owned by Univision – is carried on the basic tier of Cox's Phoenix cable system. The Commission has never recognized the availability of pay services as an adequate substitute for free, over-the-air broadcasting. Nor should it in this case, particularly because the Spanish-dominant viewers Telemundo is seeking to reach

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<sup>39</sup> Univision also observes that the station is carried on two other multichannel video programming distributors serving the Phoenix market, but those providers serve a very small number of subscribers compared to Cox. Nor is KDRX-CA carried on DBS systems offering local-into-local service in the Phoenix market, although Univision's Station KTVW-TV does enjoy such carriage.

<sup>40</sup> Univision Comments at 23-24. Council Tree also makes this claim; for the reasons discussed in the text, *infra*, this argument lacks merit.

subscribe to these pay services in disproportionately low numbers and rely on free, over-the-air as their primary source of news and information.<sup>41</sup>

**C. Univision Incorrectly Claims That NBC Telemundo Has Numerous Options For Operating A Full-Power Station In Phoenix**

Univision incorrectly claims that Telemundo has numerous options for operating a full-power station in Phoenix, including using its ownership stake in Paxson Communications Corp. (“Paxson”) to acquire KPPX, Paxson’s full-power station in Phoenix. This is pure fiction. If such options in fact existed, NBC Telemundo would have implemented one of them promptly after completing its merger with Telemundo to address the egregious lack over-the-air Spanish-language competition in Phoenix.<sup>42</sup> One of the options suggested by Univision – that NBC compel one of its non-owned affiliates to carry Telemundo programming on a digital multicast programming stream<sup>43</sup> – is ludicrous. While NBC certainly supports efforts to develop multicast digital broadcasting, this cavalier suggestion cannot even begin to address the problem of giving programming choices to Spanish-speakers who rely on *over-the-air analog* signals for their television service. Further, NBC has no ability to compel its non-owned NBC affiliate to carry Telemundo on its channel.

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<sup>41</sup> As noted in the Joint Comments, only Telemundo of the three low power stations offers some local news programming. Nearly 90 percent of the respondents in the telephone survey commissioned by NBC Telemundo reported that local television stations were their dominant source of local news and information. Joint Comments at 38-39.

<sup>42</sup> Phoenix is the only city in the top-ten Hispanic DMAs lacking a full-power competitor to Univision. *See id.* at 31. The Los Angeles DMA has six Spanish-language full-power television stations in its major urban core; the Houston DMA has five; the New York, Miami, and Dallas-Ft. Worth DMAs each have four; and Chicago and San Francisco each have three. *Id.*

<sup>43</sup> Univision Comments at 20.

Univision's suggestion that NBC Telemundo buy Paxson's Phoenix station is equally hollow. By Univision's *own* characterization based on publicly available documents, NBC Telemundo holds but a right of first refusal to acquire certain Paxson stations when a third party makes a bona fide purchase offer, an event that has not occurred and may never occur.<sup>44</sup> NBC Telemundo has no right to "cherry-pick" Paxson stations to purchase (as even a cursory review of the documents cited by Univision would reveal) and no current ability, due to regulatory and other constraints, to exercise its option to purchase the entire company.<sup>45</sup>

**D. Univision And Council Tree Incorrectly Claim That The Commission's Allotment Priorities Will Be Harmed By The Proposal**

Univision and Council Tree both claim incorrectly that the Commission's allotment priorities will be harmed by assigning the noncommercial reservation to Channel 11 in Holbrook and removing that designation from Channel \*39 in Phoenix.<sup>46</sup> The Joint Comments thoroughly discredited this argument. In fact, the Proposal *further*s the allotment priorities by avoiding the creation of a white area in Holbrook and distributing noncommercial allotments more equitably within the Phoenix DMA.<sup>47</sup> As the parties demonstrated in the Joint Comments, because it had lain fallow for so long, Channel \*39 was destined for deletion if an application had not been filed just prior to the deadline. Therefore, the Commission had already made a policy decision that the city of

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<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 20.

<sup>46</sup> *Id.* at 6; *see* Council Tree Comments at 5.

<sup>47</sup> Currently, the only noncommercial stations in the entire State of Arizona are licensed to Phoenix and Tucson, both located in the lower one-third of this very large state. *See* Joint Petition at 20-22.

Phoenix did not need a second noncommercial allotment. Moreover, even within the ten largest cities in the U.S., the Commission has disregarded the 1952 allotment policy of endeavoring to allot two reserved channels to the largest cities as often as it has followed it.<sup>48</sup> As set forth in the Joint comments, fully half of the 10 largest cities in the nation have a single noncommercial allotment. For Univision and Council Tree to suggest, under these circumstances, that the Channel \*39 allotment is now sacrosanct is contrary to the facts and past Commission action.

The suggestion by Univision that KDTP cannot survive as a noncommercial station operating in Holbrook is pure speculation which Univision has not bothered to support with any facts.<sup>49</sup> CTE owns and operates dozens of television stations around the country (including full-power and low-power stations), which air the programming of the Daystar network, the second-largest Christian television network in America. These stations are supported by local viewers *and* by an extensive network of worldwide supporters who contribute to the Daystar mission through the full range of support mechanisms available to nonprofit charitable organizations, including cash donations,

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<sup>48</sup> Univision contends that implementation of the channel exchange would leave Phoenix as “the only top twenty market other than chronically underserved Detroit to have just one noncommercial station.” Univision Comments at 6. Univision is again wrong. If the term “market” as used by Univision refers to the city of Phoenix (as in the FCC’s comparison in the NPRM), Univision apparently has disregarded the fact that fully half of the 10 largest cities in the nation have a single noncommercial allotment: New York City, No. 1 (Channel \*25); Philadelphia, No. 5 (Channel \*35); San Diego, No. 7 (Channel \*15); Dallas, No. 8 (Channel \*13); and Detroit, No. 10 (Channel \*56). *See* 47 C.F.R. § 73.606 (2003). If the term market as used by Univision means DMA, then Univision is also wrong. The Phoenix DMA will have three reserved allotments before and after the channel exchange. After the proposed exchange, the Phoenix DMA can claim three noncommercial allotments distributed throughout the DMA, with Channel \*11 in Holbrook in the eastern third of the DMA, Channel \*8 in Phoenix in the middle third, and the vacant reserved digital allotment in Kingman, Arizona on the DMA’s western border, as discussed in the Joint Comments at 17 n. 37. Finally, the Commission has an opportunity to bring another operational noncommercial service to the Phoenix DMA by granting the pending petition for reconsideration in the Channel \*43 proceeding involving Coolidge, Arizona. *See* Joint Comments at 19-20.

<sup>49</sup> Univision Comments at 13-15.

pledges, bequests, gifts of property, charitable gift annuities, trusts, and more.<sup>50</sup> As an experienced operator of noncommercial stations and a very successful fundraiser for its mission, CTE clearly is in the best position to know whether Channel \*11 in Holbrook can succeed as a noncommercial station, and CTE believes that it can. Therefore, Univision's patronizing assertion that KDTP operating on Channel \*11 in Holbrook is doomed to fail for lack of underwriting support<sup>51</sup> can be safely dismissed. Further, CTE has made the necessary commitment to the Commission to ensure that, upon approval and implementation of the Proposal, the board of directors of the licensee of Channel \*11 will be broadly representative of the Holbrook community,<sup>52</sup> thus addressing one of the issues raised by Council Tree.<sup>53</sup>

#### **IV. CONCLUSION**

The Commission unquestionably has the authority to approve the Proposal and modify the parties' licenses under Section 316 of the Communications Act.<sup>54</sup> While proceeding under Section 316 places a higher burden on the proponents than proceeding under Section 1.420(h), the Proposal clearly meets that higher standard by providing immediate and compelling public interest benefits to the Phoenix DMA that could not

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<sup>50</sup> See Daystar Website, *16 Ways to Donate to Daystar*, <http://www.daystar.com/16ways.htm> (visited on Dec. 12, 2004).

<sup>51</sup> Univision Comments at 14.

<sup>52</sup> Joint Comments at 27-28.

<sup>53</sup> See Council Tree Comments at 8.

<sup>54</sup> See NPRM; see also *Achernar Broadcasting Company*, 15 FCC Rcd 7808 (2000) (granting application for Channel 64 and on Commission's own motion modifying the construction permit to specify operation on Channel 16 to avoid potential interference with public safety uses on Channel 64 following reallocation of Channels 63, 64, 68 and 69 in the Balanced Budget Act of 1997).

and will not be realized in the absence of the Proposal. The channel exchange proposed by NBC Telemundo and CTE will end Phoenix's Spanish-language gray area, ensure that Holbrook does not become a white area, and offer to the residents of Phoenix an immediate full-power competitor to Univision and a vibrant and financially viable source of Spanish-language news, public affairs, children's educational and entertainment programming. For all of these reasons, government leaders, including Representative Raul Grijalva of Arizona's 7<sup>th</sup> Congressional District, the Governor of Arizona, and the Mayor of Phoenix, as well as numerous civic, public safety, and cultural organizations have spoken out in support of the Proposal, while the only two commenters who oppose the Proposal are current and potential competitors. The Commission should act promptly to bring the substantial benefits of the Proposal to the Hispanic residents of Phoenix and to ensure the survival of Holbrook's only operating television station.

Respectfully submitted,

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Dated: December 14, 2004

## **CERTIFICATE OF SERVICE**

I, Theresa L. Rollins, do hereby certify that a copy of the foregoing “Joint Reply Comments of NBC Telemundo License Co. and Community Television Educators, Inc.” was served by electronic mail this 14th day of December, 2004, on the following:

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